Sr Katherine Lim KH v Ketua Pengarah Perkhidmatan Perubatan Malaysia & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-01-1-97

GOPAL SRI RAM, NH CHAN AND ABDUL MALEK AHMAD JJCA

14 APRIL 1997

Limitation *— Public Authorities Protection Act — Whether action time-barred — Whether Limitation Act 1953 or Public Authorities Protection Act 1948 applies — When time began to run — Whether claimant must exhaust all other administrative remedies before filing action in court — Public Authorities Protection Act 1948 s 2(a) — Limitation Act 1953 s 29*

The appellant, an employee of the first respondent (ie the Ministry of Health, Malaysia), filed an originating summons dated 7 November 1996, praying inter alia, for a declaration that the decision of the respondents purporting to dismiss her from her post as a nursing sister was null and void. The appellant maintained that she was away in Australia from March 1988 until 1991 doing her Master's degree. On 7 July 1988, the respondent had published a notice in the government gazette asking the appellant to report for duty within seven days as she had left her duties without leave or without any other reasonable cause failing which she would be deemed to have been dismissed from service. A preliminary objection was raised by the respondents that the action was time barred in view of s 2(a) of the Public Authorities Protection Act 1948 ('the PAPA') which provides that the action must be commenced 'within 36 months next after the act, neglect or default complained of ...' and that limitation ran from the date of the government gazette. The appellant submitted that s 29 of the Limitation Act 1953 applied in this case and not s 2(a) of the PAPA. It was also contended by the appellant that she had to exhaust all other remedies before coming to court, and argued that time should start only when conciliation fails.

Held, dismissing the appeal:

(1) Since this matter involved a public authority, s 2(a) of the PAPA applied and time, therefore, must run from the date of the gazette publication, namely 7 July 1988, meaning that any suit or action by the appellant against the respondents must be filed before 6 July 1991. Having filed the originating summons only on 7 November 1996, the appellant was clearly out of time by five years and four months. On this preliminary point alone, her claim failed. Therefore, there was no necessity for the court to dwell on the merits (see pp 542I and 543A–B).

(2) It was not a pre-condition under any written law that the appellant had to exhaust all other administrative remedies before coming to court. She could have taken both actions, namely to exhaust the other remedies and to file the court action simultaneously to meet the deadline provided under s 2(a) of the PAPA (see p 543B–C).

A **[Bahasa Malaysia summary**

Perayu, yang merupakan seorang pekerja penentang pertama (iaitu Kementerian Kesihatan Malaysia), memfailkan suatu saman pemula bertarikh 7 November 1996, yang meminta antara lain, suatu perisytiharan supaya keputusan penentang-penentang yang kononnya
B memecatnya dari jawatan sebagai seorang jururawat adalah tak sah dan terbatal. Perayu berhujah bahawa dia berada di Australia dari bulan Mac 1988 sehingga tahun 1991 demi meneruskan pelajaran untuk ijazah sarjana. Pada 7 Julai 1988, penentang telah menerbitkan suatu notis dalam warta kerajaan yang meminta perayu melaporkan diri untuk bertugas dalam tempoh tujuh hari oleh kerana dia telah
C meninggalkan tugas tanpa kebenaran atau tanpa sebarang sebab munasabah yang lain dan kegagalan berbuat demikian akan menyebabkan perayu dianggap dipecat dari perkhidmatan. Bantahan permulaan ditimbulkan oleh penentang-penentang bahawa tindakan adalah dihalang oleh had masa memandangkan s 2(a) Akta
D Perlindungan Pihak Berkuasa Awam 1948 ('PPBA') yang memperuntukkan bahawa tindakan mestilah dimulakan 'dalam tempoh 36 bulan selepas tindakan, kecuaian atau keingkaran yang diadukan ...' dan bahawa had masa bermula dari tarikh warta kerajaan. Perayu berhujah bahawa s 29 Akta Had Masa 1953 terpakai dalam kes ini dan bukan s 2(a) PPBA. Ia juga dihujahkan oleh perayu
E bahawa dia terpaksa menggunakan semua remedi yang lain sebelum menghadap mahkamah, dan berhujah bahawa masa hanya patut bermula apabila pendamaian gagal.

Diputuskan, menolak rayuan:

F (1) Oleh kerana perkara ini melibatkan sebuah pihak berkuasa, s 2(a) PPBA terpakai dan masa, dengan itu, mestilah bermula dari tarikh terbitan warta, yakni 7 Julai 1988, dan bermakna bahawa apa-apa guaman atau tindakan oleh perayu terhadap penentang-penentang mesti difailkan sebelum 6 Julai 1991. Oleh kerana
G perayu hanya memfailkan saman pemula pada 7 November 1996, adalah jelas dia telah melampaui had masa selama lima tahun dan empat bulan. Atas hujah permulaan ini sahaja, tuntutannya gagal. Maka, tiada keperluan untuk mahkamah mempertimbangkan meritnya (lihat ms 542I dan 543A–B).

H (2) Tidak merupakan pra-syarat di bawah mana-mana undang-undang bertulis bahawa perayu haruslah menggunakan semua remedi pentadbiran lain sebelum menghadap mahkamah. Dia sepatutnya mengambil kedua-dua tindakan, iaitu untuk menggunakan remedi lain dan memfailkan tindakan mahkamah serentak supaya menepati tarikh akhir yang diperuntukkan di
I bawah s 2(a) PPBA (lihat ms 543B–C).]

Notes

For cases on limitation period governed by the Public Authorities Protection Act 1948, see 2 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1903–1905.

Legislation referred to

Limitation Act 1953 s 29
Public Authorities Protection Act 1948 s 2(a)

Appellant in person.
Azmi Talib (Federal Counsel, Attorney-General's Chambers) for the respondents.

Abdul Malek Ahmad JCA (delivering the judgment of the court): This appeal has been argued impressively by the appellant, who was the plaintiff in the court below. However, after considering her oral and written submissions, we could not, despite our admiration for the way she handled the matter without the services of counsel, agree with her on the preliminary point of limitation.

The prayers in her originating summons dated 7 November 1996 were as follows:

(a) for a declaration that the decision of the defendants purporting to dismiss the plaintiff from her post was ultra vires the General Orders, in breach of natural justice, and therefore the decision was null and void, inoperative and of no consequence, and that the plaintiff is still an employee of the Ministry of Health, Malaysia;

(b) for a declaration that the erroneous decision of the defendants, purporting that there was a disciplinary action to prevent permission for post-graduate study leave was defamatory, unjustified and in breach of natural justice; and therefore null and void, inoperative, and of no consequence; and that the plaintiff be granted post-graduate study leave with salary;

(c) for an order that the plaintiff be reinstated to her former position without any loss in seniority and remuneration;

(d) for an order that an account be taken of all salaries, emoluments and other benefits due to her from the date of her purported dismissal and the same to be paid to her;

(e) for an order that costs of this action be paid by the defendants to the plaintiff; and

(f) such further and other reliefs that this honourable court deems just and expedient.

At the hearing before the learned High Court judge, the respondents had raised two preliminary objections. Firstly, the action is time barred in view of s 2(a) of the Public Authorities Protection Act 1948 ('the PAPA') and secondly, the matter should have commenced by writ instead of by originating summons since the facts are in dispute.

It is necessary to reproduce s 2(a) of the PAPA at this juncture:

> 2 Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended

execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority, the following provisions shall have effect —

(a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof.

Before us, the appellant started off her submissions by stating that s 29 of the Limitation Act 1953 ('the LA') applied in this case and not s 2(a) of the PAPA. The section reads:

29 Postponement of limitation period in case of fraud or mistake

Where, in the case of any action for which a period of limitation is prescribed by this Act, either —

(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which —

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

She maintained that she was away in Australia from March 1988 until 1991 doing her Master's degree and was not at all aware of the letter sent by the Ministry of Health to the Secretary of the Public Services Commission on 13 May 1988.

In that letter, the writer referred to a meeting of the disciplinary board for Group B of the Hospital Sultanah Aminah, Johor Bahru on 20 April 1988 which had recommended that the appellant be dismissed from service for failing to report for duty without leave or for reasonable cause from 9 March 1988 to the date of the letter. Consequently, the department had sent a registered letter dated 19 March 1988 and posted on 21 March 1988 to the appellant's last known address without getting any response. The letter added that it was believed that the appellant had left the country but her whereabouts overseas was not known.

The appellant further argued that all actions taken were defamatory to her professional growth as the relevant principal matron had made two major mistakes in giving fraudulent information by saying that disciplinary action had been taken against the appellant for two reasons. A

One was that the appellant had been absent from work when she was doing her bachelor's degree in Singapore in 1984. The appellant insisted that she had in fact applied for study leave for that degree and referred to some of the correspondence from 1983 to 1986 exhibited in her affidavits. However, on our closer examination, these letters showed that she had in fact applied for study leave but there was actually no letter of approval. The other was that she had been accused of sending a letter from the Johore State Government to the Federal Government. B C

Stressing on the limitation point, she reiterated that she had to exhaust all other remedies before coming to court and referred to the article titled 'Alternative Dispute Resolution: A Glance at the Law of Malaysia and India' by Prof Dr PS Sangal in [1996] 3 MLJ xxix which held the view that the alternative modes of dispute resolution was arbitration followed by conciliation or mediation. Time should start, she argued, only when conciliation fails. D

The appellant concluded that she had received a state scholarship and had good reason to be away for the relevant period and it was the respondent's fault for not granting her the permission. Since then, she had suffered humiliation as when she subsequently applied for a job in Assunta Hospital, she was not successful. Finally, she asked us to decide the matter without having to refer the matter back to the High Court. E

The short reply of the learned Federal Counsel for the respondents was that s 2(a) of the PAPA was applicable and limitation runs from the date of the government gazette on 7 July 1988. He had also referred to the letter from the Public Services Department to the Ministry of Health dated 22 February 1988 which clearly stated that the appellant was not entitled to study leave on full pay as there was no such provision for officers not in Group A. The letter clarified that the department could consider approving study leave without pay for the appellant but since disciplinary action was being taken against her, this was also out of the question. F G

Despite the contention of the learned Federal Counsel in the High Court, we found that the facts are actually not in dispute. The appellant who was a nursing sister at the Hospital Sultanah Aminah in Johor Bahru applied for but was not successful in getting study leave with full pay to do a postgraduate course in Australia in 1988. In spite of that, she left for her studies on 9 March 1988. On 7 July 1988, the respondent had published a notice in the government gazette asking the appellant to report for duty within seven days as she had left her duties without leave or without any other reasonable cause failing which she would be deemed to have been dismissed from service with effect from the date of her absence. Of course, we now know the appellant never came back until 1991. H I

We are of the considered view that since this matter involves a public authority, s 2(a) of the PAPA applies and time, therefore, must run from

A the date of the gazette publication, namely 7 July 1988, meaning that any suit or action by the appellant against the respondents must be filed before 6 July 1991. Having filed the originating summons only on 7 November 1996, she is clearly out of time by five years and four months. On this preliminary point alone, her claim fails.

B The second issue is whether she needs to exhaust all other administrative remedies before coming to court. This is not a pre-condition under any written law and she could have taken both actions, namely to exhaust the other remedies and to file the court action simultaneously to meet the deadline provided under s 2(a) of the PAPA.

C There is, therefore, no necessity for us to dwell on the merits. We are in full agreement with the findings of the learned trial judge. On the limitation point alone, we have to dismiss her appeal with costs and order that the deposit is to go the respondents to the account of their taxed costs.

Appeal dismissed.

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Reported by Jafisah Jaafar

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